

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON**

IN RE ETHICON, INC., PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION	Master File No. 2:12-MD-02327 MDL 2327 JOSEPH R. GOODWIN U.S. DISTRICT JUDGE
THIS DOCUMENT RELATES TO: <i>Barbara Smith, et al. v. Ethicon, Inc. et al.</i> Case No. 2:12-cv-04791	

**MOTION AND MEMORANDUM OF LAW IN SUPPORT OF ETHICON’S MOTION
TO EXCLUDE CASE SPECIFIC OPINIONS OF DR. DANIEL ELLIOTT**

Defendants Ethicon, Inc. and Johnson & Johnson, Inc. (collectively “Ethicon”) file this Reply in Support of Ethicon’s Motion to Exclude Case Specific Opinions of Dr. Daniel Elliott (“Dr. Elliott”).

I. Ethicon’s Motion Should Not be Denied for Failing to Seek Leave.

Plaintiffs argued in their opposition that Ethicon’s *Daubert* motion should be stricken for failure to request leave to file the motion, a perceived violation of PTO 328. Plaintiffs previously raised this exact argument in ECF No. 65. Ethicon previously filed an opposition to that motion (ECF No. 70) and hereby fully incorporate all of their arguments herewith.

II. Ethicon’s Arguments Regarding General Causation are Properly Asserted.

Plaintiffs’ case specific expert report included opinions of Dr. Elliott that can be described as general causation opinions. Despite including these opinions as part of their case specific opinion, Plaintiff argues in their opposition (ECF No 71) that Ethicon can only attack those opinions in the general MDL. (ECF No. 71 at 2-4). Plaintiffs’ argument that general

causation opinions included in case specific opinion, cannot be subject to *Daubert* motions unless filed in the general MDL, is illogical.

Ethicon indicated in its *Daubert* motion that it would file, in the main MDL docket, a separate motion to exclude Dr. Elliott's general opinions ("General Motion"), which it did. Nevertheless, Ethicon argued that to the extent Dr. Elliott's case-specific opinions were the same as the general opinions excluded by this Court in a prior Wave, then they should be excluded here. It would be illogical for Plaintiffs to be permitted to include general causation opinions in a case specific opinion, but not allow Defendants to mention that the included general causation opinions should be excluded.

III. Ethicon Does Not Dispute the Applicable State Law.

Ethicon does not dispute that Oregon law applies to this case. In its *Daubert* Motion (ECF No. 64), Ethicon inadvertently cited a Washington case on one occasion for the general and benign proposition that a product manufacturer can be liable for failing to provide adequate warnings if a plaintiff is harmed by product. This inadvertent citation of a Washington case did not cause any harm to plaintiff, as Ethicon could have cited an Oregon case for the same legal concept. See *Benjamin v. Wal-Mart Stores, Inc.*, 61 P. 3d 257 (Ore. App. 2002); *Glover v. BIC Corp.*, 6 F3d 1318 (9th Cir. 1993) (applying Oregon law); *Barry v. Don Hall Labs.*, 642 P.2d 685 (Ore. Ct. App. 1982); *Harris v. Northwest Natural Gas Co.*, 284 Or 571 (1978); *McEwen v. Ortho Pharmaceutical Co.*, 270 Or 375, 385-87 (1974); *Anderson v. Klix Chemical*, 256 Or 199, 203 (1973). Any argument by Plaintiff regarding this error should be disregarded.

CONCLUSION

For the reasons stated above, this Court should limit or exclude Dr. Elliott's case-

specific opinions as set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed this document with the clerk of the court using the CM/ECF system, which will send notification of this filing to CM/ECF participants registered to receive service in this MDL.

/s/ William M. Gage

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